

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

TERESA R DYBEVIK
Claimant

APPEAL NO. 11A-UI-03485-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CEI EQUIPMENT COMPANY INC
Employer

OC: 02/06/11
Claimant: Respondent (1)

Section 96.5-2-A - Discharge for Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated March 14, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on April 11, 2011. Claimant participated. Employer participated by Karen Gaddis, Chief Financial Officer, and Maria Evans, Administrative Assistant. The record consists of the testimony of Karen Gaddis; the testimony of Maria Evans; and the testimony of Teresa Dybevik, now known as Teresa Pinkerton.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer manufactures semi-trailers at its facility located in Cedar Rapids, Iowa. The claimant was hired on August 23, 2010, as a receptionist. She was a full-time employee. Her last day of work was January 26, 2011. She was terminated on February 1, 2011.

The incident that led to the decision to terminate the claimant possibly occurred on January 12, 2011, or January 13, 2011. The claimant was terminated because the employer believed that the claimant disparaged the employer's clients. The employer could not identify which client had been disparaged or when but that it had occurred on several occasions. For example, the claimant supposedly said something about one of the employer's clients should be reported to PETA for the way it treated its animals. The claimant denied saying this and further added that she did not even support PETA. Another time the claimant said something about a client getting ready to file bankruptcy. The employer believed the claimant was getting this information from an attorney for whom the claimant used to work. The claimant denied all of these statements.

The claimant believed that she was terminated because she did not fit in with the employer, which was a close knit family owned company.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 NW.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

There is scant reliable evidence upon which to base a decision in this case since all of the witness' testimony lacked credibility. There is no way to reconcile the testimony and none of the witnesses gave a consistent credible statement on what occurred. The employer's reason for termination was that the claimant was "bad-mouthing" its clients. The claimant adamantly denied saying anything disparaging about the employer's clients. She also denied that she was ever talked to about her comments or that this reason was given to her when she was terminated.

Whatever the truth might be about these alleged statements, Ms. Gaddis was asked specifically when the incident occurred that led to the decision to terminate the claimant. In the opening statement, the administrative law judge stated that evidence was necessary about *when* the incident occurred that led to the decision to terminate the claimant as a finding needed to be made on whether there was a current act of misconduct. Ms. Gaddis said that the incident occurred perhaps around January 12, 2011, or January 13, 2011. She could not say anything else about what was said. The claimant was not terminated until February 1, 2011. She was at work until her last day, which was January 26, 2011, with the exception of January 17, 2011. Even assuming that the incident on either January 12, 2011, or January 13, 2011, occurred and was misconduct, it was not a *current* act of misconduct.

The employer has not met its burden of proof to show that the claimant was discharged for a current act of misconduct. Benefits are therefore allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated March 14, 2011, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css